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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 172

EUGENE DUPREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, dated March 10, 1958 (Pet. App. 6a–8a), is not reported. The opinion of the District Court, dated November 5, 1956 (Pet. App. 34a–37a), is reported at 146 F. Supp. 148. The opinions of the United States Court of Appeals for the Third Circuit (Pet. App. 24a–33a, 9a–16a), are reported at 247 F. 2d 819, 264 F. 2d 140, and 266 F. 2d. 373.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1959 (Pet. App. 17a). On May 8,

1959, the court granted leave to petitioner to file a petition for rehearing out of time (Pet. App. 21a). The petition for a rehearing was denied on May 8, 1959 (Pet. App. 21a–23a). A petition for certiorari was filed on July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action may be maintained against the United States, under the Federal Tort Claims Act, on a claim arising out of the alleged wrongful withholding of a security clearance by the Commandant of the Coast Guard proceeding under the merchant seamen screening program established pursuant to statute and executive order.

STATUTES, EXECUTIVE ORDER AND REGULATIONS INVOLVED

The pertinent provisions of the Magnuson Act, the Federal Tort Claims Act, Executive Orders 10173 and 10352, as amended, 33 C.F.R. (1956 Supp.) Part 6, and the Coast Guard regulations, 33 C.F.R. (1956 Supp.) Part 121, are set forth in the Appendix, pp. 16–22.

STATEMENT

The petition for certiorari seeks review of the second and most recent judgment of the Court of Appeals holding that petitioner's claim against the United States, based upon the alleged wrongful denial of a security clearance by the Commandant of the Coast Guard, is foreclosed by the exceptionary provisions of the Federal Tort Claims Act, 28 U.S.C. 2680. The background and history of this litigation are as follows:

The Magnuson Act, 50 U.S.C. 191 (App., *infra*, 16), provides that whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, subversive activity, or disturbances or threatened disturbances of the international relations of the United States, he may issue rules and regulations to safeguard vessels and waterfront facilities against destruction from sabotage or other subversive acts. Pursuant to this Act, the President issued Executive Order 10173[1] in which he made the statutory finding that the security of the United States is endangered by subversive activity, prescribed regulations relating to the safeguarding of vessels, harbors, ports and waterfront facilities of the United States, and directed that the Coast Guard administer and enforce these regulations.

The regulations, as amended,[2] authorized the Commandant of the Coast Guard to require that licensed officers and certificated men employed on merchant vessels of the United States be holders of specially validated documents reflecting their security clearance. The regulations provided that no person shall be issued such a document, nor shall any person be employed on a merchant vessel of the United States, "unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual

[1] 15 F.R. 7005 (October 18, 1950).

[2] See Executive Order 10277, 16 F.R. 7537 (August 1, 1951) and Executive Order 10352, 17 F.R. 4607 (May 19, 1952); 33 C.F.R. (1956 Supp.), Part 6.

on board would not be inimical to the security of the United States."[3]

Any person who was denied a security clearance or who was refused employment under these provisions was given rights of appeal (33 C.F.R. (1956 Supp.) 121.21–121.31). Briefly, a person denied security clearance could appeal to a Local Appeal Board, which was comprised of one representative of the Coast Guard, management, and labor. The Board was to furnish the appellant with a bill of particulars as to the data on which the adverse determination had been made (33 C.F.R. (1956 Supp.) 121.21), and conduct hearings pursuant to the procedures set forth in the regulations. After consideration of the evidence and material before it, the Board would then transmit its recommendation, together with underlying reasons, to the Commandant, who could either approve or reject the recommendation of the Board or remand the case for further proceedings. The Commandant would notify the applicant of his decision (33 C.F.R. (1956 Supp.) 121.25). If the decision was adverse, the applicant was entitled to a further appeal to the National Appeal Board which similarly was comprised of a representative of the Coast Guard, management, and labor. This Board would also conduct hearings and transmit a recommendation to the Commandant (33 C.F.R. (1956 Supp.) 121.27, 121.29) who had the "final authority to grant or deny security clearance" (33 C.F.R. (1956 Supp.) 121.31). It was pursuant to the statute and executive order, and in accordance

[3] 33 C.F.R. (1956 Supp.) 6.10–1. (App. *infra*, p. 17.)

with these Coast Guard regulations, that petitioner was denied the security clearance which underlies this litigation.[4]

Petitioner's original "complaint in trespass" (Pet. App. 39a–41a), filed June 13, 1956, alleged that from 1930–1956, he was a licensed ship's master, having been issued a license by the Coast Guard.[5] In September 1950, petitioner applied for a berth as a ship's master, but the Coast Guard refused to issue him a validated document which was required for his employment as an officer (Pet. App. 39a). In May 1951, the Coast Guard advised that the document had been denied because there was reason to believe that petitioner had been affiliated or was sympathetic with an organization or group of persons subversive or disloyal to the United States (Pet. App. 39a).[6]

[4] In October 1955, in an action to enjoin enforcement of the regulations brought by seamen who initially had been denied security clearance, the Court of Appeals for the Ninth Circuit held the regulations to be invalid as a denial of due process of law in that they failed to give adequate notice and opportunity to be heard. *Parker v. Lester*, 227 F. 2d 708, rehearing denied, 235 F. 2d 787 (C.A. 9). In order to comply with that ruling, the Coast Guard issued revised regulations, effective May 1, 1956 (21 F.R. 2814), which changed the provisions of the former regulations with respect to notice to the seamen and denial of opportunity to confront and cross-examine informants. The denial of petitioner's security clearance, the appeals and the hearings which followed that denial, and the ultimate decision to give him a security clearance occurred under the pre-1956 regulations.

[5] A prior suit for loss of wages and earnings, brought in the Court of Claims, was dismissed for lack of jurisdiction. *Dupree v. United States*, 141 F. Supp. 773 (C. Cls.).

[6] A bill of particulars, which the Coast Guard subsequently gave to petitioner and which stated the reasons why the vali-

Petitioner requested and was given a hearing, and afterwards invoked the appeal procedures involving further hearings, during the course of which he denied the charges and challenged the legality of the procedures. In November 1955, following a recommendation by the National Appeal Board, the Commandant of the Coast Guard reversed his earlier determination and issued petitioner a security clearance, thus making him eligible for employment as a ship's master (Pet. App. 39a–40a). In petitioner's original complaint, he sought damages in the amount of $100,000 for (1) loss of earnings, (2) legal and other expenses incurred in obtaining his clearance, (3) an allegedly incurable physical disability, and (4) for the humiliation and disgrace he allegedly suffered "as a result of having been determined" to be affiliated with subversive or disloyal groups (Pet. App. 40a–41a).

On the Government's motion, the District Court dismissed the complaint, holding that petitioner's claim was barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a). *Dupree* v. *United States*, 146 F. Supp. 148; Pet. App. 34a–37a. On appeal, the Court of Appeals (Judges Maris, Kalodner, and Staley) affirmed. 247

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dated document was withheld, is set out in the opinion in petitioner's suit against the United States brought in the Court of Claims (141 F. Supp. 773 (C. Cls.)). Among the reasons stated are: That petitioner had joined the Communist Party in 1936, that he had distributed Communist literature, that he had organized meetings which furthered Communist Party policies, and that he had been associated with other specified Communist front activities from the late 1930's to 1953.

F. 2d 819; Pet App. 24a–33a. The court held that petitioner's claim was based upon the asserted illegality of the regulations pursuant to which petitioner's security clearance was processed and denied, and was therefore barred by the terms of the Tort Claims Act, 28 U.S.C. 2680(a). In addition, the court held that, as to the Commandant of the Coast Guard, the discretionary function exception of the Tort Claims Act (28 U.S.C. 2680(a)) "is clearly applicable. Whether the claim be based upon the wrongful denial of a security clearance or upon the promulgation of unreasonable and unconstitutional regulations, it is barred" (247 F. 2d at 825; Pet App. 32a–33a). The judgment of the Court of Appeals was entered on June 10, 1957, and a petition for rehearing was denied on July 11, 1957.

On September 19, 1957, petitioner filed a second complaint in the District Court (Pet. App. 1a–4a). This complaint is essentially a restatement of the claim sought to be stated in the original complaint. Paragraph 8 of the second complaint, however, characterized the Coast Guard's action as "improper, unwarranted, unreasonable, unjustifiable and negligent" for the reasons set forth in Paragraphs 9 through 11 of the complaint (Pet. App. 2a). In Paragraph 9, petitioner alleged that the Coast Guard was negligent by virtue of its action, prior to May 23, 1951, in preventing the petitioner's employment upon a United States vessel without granting him an administrative proceeding (Pet. App. 2a). Paragraph 10 of the complaint stated that subsequent to May 23, 1951, the Coast Guard was negligent in that the administrative

proceedings afforded plaintiff were negligently conducted in that the Government "refused to produce, disclose or identify any of its witnesses or evidence" (Pet. App. 3a). In Paragraph 11, petitioner alleged negligence on the part of the United States because, in effect, petitioner had continuously denied all administrative allegations bearing upon his security clearance (Pet. App. 3a).

The Government moved to dismiss the second complaint on the ground that the prior judgment of the District Court, affirmed on appeal, was *res adjudicata,* since the second complaint purported to state the same cause of action and presented factual and legal issues identical to those presented by the original complaint. As additional grounds for dismissal, the Government invoked the two-year statute of limitations and urged that the complaint failed to state a cause of action (Pet. App. 5a).

The District Court treated the second complaint "as an attempt to amend" the original complaint (Pet. App. 6a–8a), and dismissed the complaint for the reason that the court was "without power * * * to entertain" the complaint and without power to permit an amendment to the original complaint which had been dismissed and the judgment of dismissal affirmed on appeal (Pet. App. 7a–8a).

On appeal, the Court of Appeals (Judges McLaughlin, Kalodner and Hastie) again affirmed. Without passing upon the correctness of the ground assigned by the District Court for its dismissal, and without passing upon the Government's claim that the prior judgment of the District Court was *res*

judicata, the court held that petitioner's claim was one arising from the interference by the Government with contractual rights, *i.e.*, interference by a Government agent or agency with petitioner's prospective employment rights (264 F. 2d 140; Pet. App. 9a–16a). Petitioner sought and was granted leave to file a petition for rehearing out of time (Pet. App. 18a–20a). The petition for rehearing was denied on May 8, 1959 (Pet. App. 21a), Chief Judge Biggs dissenting (Pet. App. 21a–22a).

ARGUMENT

By two complaints in the District Court, petitioner has sought redress against the United States under the Federal Tort Claims Act for the alleged wrongful temporary denial of a security clearance by the Commandant of the Coast Guard. The Court of Appeals, on both occasions that petitioner's claim has been before it, has held that petitioner's claim is barred by the exceptionary provisions of 28 U.S.C. 2680(a) and 2680(h) of the Federal Tort Claims Act. The decision is correct, there is no conflict, and further review by this Court is not warranted.

1. It is clear from petitioner's two complaints that the claim asserted is one arising from the alleged tortious interference by the Coast Guard with petitioner's right to obtain and perform employment contracts with third parties. In each complaint, he asked damages based upon loss of wages and earnings and other benefits incidental to employment (Pet. App. 3a, 40a–41a). The second complaint alleges that the United States determined and advised petitioner

that "no third party could employ him on any vessel of the United States Merchant Marine" (Pet. App. 2a); and "the United States Government continued to refuse to permit third parties to employ [petitioner] on any United States vessel throughout the period from September 1950 to November 1955" (Pet. App. 2a).[7] In the Court of Appeals, petitioner relied upon the rule which recognizes that, unless justified or privileged, conduct which prevents a person from entering into business relations with a third person is actionable (264 F. 2d at 143; Pet. App. 12a–13a; and see Pet. 10).

In the light of these allegations and petitioner's argument in support of his claim, the court below was plainly correct in characterizing petitioner's claim as one based upon alleged tortious interference with his right to enter into employment contracts with third persons. It is equally clear, as the Court of Appeals held, that the claim is barred by the express terms of the Tort Claims Act which excludes from its coverage claims "arising out of * * * interference with contract rights" (28 U.S.C. 2680(h)).

This jurisdictional exception permits of no distinction based upon the fact that the governmental action complained of did not affect an existing contract, but operated only as to petitioner's prospective employment rights. The tort of interference with a prospective or potential contractual relationship is merely an extension of, and has run parallel to, the tort based

[7] Similar allegations appear in petitioner's original complaint (Pet. App. 40a).

upon interference with existing contractual relations. See, *Prosser on Torts* (2d ed.) pp. 745–749; Restatement of Torts, §§ 766–767.[8] There is no basis for supposing that Congress, in 28 U.S.C. 2680(h), intended to immunize the United States from liability for interference with an existing contractual relationship and at the same time to subject the United States to liability for interference with a mere contractual expectancy. Courts have, accordingly, uniformly construed the 2680(h) exception as embracing interference with prospective contract rights as well as existing contract rights. *Fletcher* v. *Veterans Administration,* 103 F. Supp. 654 (E.D. Mich.); *Builders Corporation of America* v. *United States,* 148 F. Supp. 482 (N.D. Cal.), reversed on other grounds, 259 F. 2d 766 (C.A. 9); *United States* v. *Ein Chemical Corp.,* 161 F. Supp. 238, 246, 247 (S.D.N.Y.).

There is no direct conflict between the decision below and that of the Ninth Circuit in *Builders Corp. of America* v. *United States,* 259 F. 2d 766, since the Ninth Circuit has not yet authoritatively construed or applied the exception in 28 U.S.C. 2680(h).[9] The

[8] It is well recognized that as between an existing and prospective contractual relationship the former is far more entitled to protection from interference than the latter. See, *Restatement of Torts,* § 766, *Comment b,* and cf. § 767; *Prosser on Torts* (2d ed.) pp. 745–749.

[9] On March 27, 1959, the district court granted the Government's motion for summary judgment in *Parker et al.* v. *United States,* No. 36830 (N.D. Cal.), on the ground that the claims asserted, also arising from the merchant seamen screening program, were barred by the exception in 28 U.S.C. 2680(h). An appeal from the judgment has been noted, and lies to the Ninth Circuit.

error underlying the reversal in *Builders Corp.* was that the district court had applied the 2680(h) exception on a motion to dismiss the complaint without full development of the facts. As Judge Fee carefully pointed out, the sole question before the court in *Builders Corp.* was "whether the motion to dismiss should have been sustained or the facts should have been further developed before judgment entered" (259 F. 2d 766). Here, the issue whether the 2680(h) exception applies to "alleged negligent interference with * * * prospective economic advantage, *viz.*, future employment" was held by the court below to have been "squarely presented" (264 F. 2d at 140, 141, 142; Pet. App. 9a, 11a) and, in denying the petition for rehearing based on alleged conflict between the instant decision and that of the Ninth Circuit in *Builders Corp.*, the court stated that "we are of the opinion that the reversing opinion [in *Builders Corp.*] is inapposite in that it was premised on considerations absent in the instant case" (266 F. 2d 373; Pet. App. 21a). Although the dissenting opinion by Chief Judge Biggs on petition for rehearing in this case (266 F. 2d at 373–374; Pet. App. 21a–22a) and the concurring opinion of Judge Pope in the *Builders Corp.* case (259 F. 2d at 733) suggest that the 28 U.S.C. 2680(h) exception may be open to an interpretation other than that given it by the court below, it still remains that the present case is the only decision by a court of appeals in which the scope and applicability of the contract interference provision of 2680(h) has been directly considered.

2. On petitioner's first appeal (247 F. 2d 819; Pet. App. 24a–33a), it was held that the discretionary

function exception in 28 U.S.C. 2680(a) was "clearly applicable" to the Commandant of the Coast Guard whose decision it was to deny petitioner a security clearance (247 F. 2d at 825; Pet. App. 32a–33a).[10] Further, the court held that 28 U.S.C. 2680(a) bars a claim, such as petitioner's, based upon the alleged invalidity of the Coast Guard regulations (247 F. 2d at 825; Pet. App. 32a). The exceptionary provisions of 28 U.S.C. 2680(a) thus stand as a further bar to the maintenance of petitioner's suit.

The gravamen of the alleged cause of action is the denial of a security clearance, and the final authority to grant or deny such a clearance was vested exclusively in the Commandant of the Coast Guard (Executive Order 10173; 33 C.F.R. (1956 Supp.) 121.31) (App. *infra*, pp. 17, 22). The discretionary character of this determination cannot be gainsaid, for the Commandant's determination, made in strict conformity with statute, executive orders and regulations (App., *infra*, pp. 16, 17–22), was the product of judgment based upon numerous factors and arrived at by weighing and evaluating the varied information before him. The Commandant's action—the basic wrong of

[10] The prior judgment of the Court of Appeals, affirming the District Court's dismissal of petitioner's original complaint, became final on July 11, 1957 (247 F. 2d 819), and is not now subject to review by this Court. It is the Government's position that the prior judgment of dismissal, affirmed without leave to amend the complaint, is *res judicata* as to petitioner's claim and precludes consideration of the merits of the second complaint. *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464 (C.A. 3), certiorari denied, 341 U.S. 921; *W. E. Hedger Transp. Corp.* v. *Ira S. Bushey & Sons, Inc.*, 186 F. 2d 236 (C.A. 2).

which petitioner complains—comes squarely within that category of governmental conduct which Congress, by 28 U.S.C. 2680(a), sought to exclude from the coverage of the Tort Claims Act.[11] *Dalehite* v. *United States*, 346 U.S. 15, 33–34, 35–36, 43; *Schmidt* v. *United States*, 198 F. 2d 32 (C.A. 7), certiorari denied, 344 U.S. 896; *Matveychuk* v. *United States*, 195 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 845; *Chournos* v. *United States*, 193 F. 2d 321 (C.A. 10), certiorari denied, 343 U.S. 977; *Powell* v. *United States*, 233 F. 2d 851 (C.A. 10).[12]

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[11] The Congressional Committee reports explained the § 2680(a) exception (see *Dalehite* v. *United States*, 346 U.S. 15, at 29) with a paragraph which stated in part, "It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."

[12] The denial to petitioner of a security clearance was accomplished in strict conformity with the requirements of the executive order and regulations. (Cf. *Hatahley* v. *United States*, 351 U.S. 173). To the extent that petitioner's claim is predicated upon the insufficiency or invalidity of the administrative processes accorded him, the claim is, as the Court of Appeals held on the first appeal (247 F. 2d at 825; Pet. App. 32a), barred by the terms of 28 U.S.C. 2680(a) which additionally excludes from the coverage of the Tort Claims Act any claim based upon an act or omission of an employee, exercising due care, in the "execution of a statute or regulation, whether or not such statute or regulation be valid * * *."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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AUGUST 1959.

APPENDIX

1. The Magnuson Act, 64 Stat. 427, 50 U.S.C. 191, provides in pertinent part as follows:

Regulation of anchorage and movement of vessels during national emergency.

* * * * *

Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

* * * * *

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States.

2. The Federal Tort Claims Act, 28 U.S.C. 1346, 2671, *et seq.*, provides in pertinent part (28 U.S.C. 2680) as follows:

Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform

a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. The pertinent provisions of Executive Orders 10173 and 10352, as amended, 33 C.F.R. (1956 Supp.) Part 6, are as follows:

§ 6.10–1 [E.O. 10352] *Issuance of documents and employment of persons aboard vessels.* No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided,* That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

§ 6.10–3 [E.O. 10173] *Special validation of merchant marine documents.* The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

* * * * *

4. The pertinent provisions of the Coast Guard regulations, 33 C.F.R. (1956 Supp.) Part 121, are as follows:

* * * * *

§ 121.13 *Application for security clearance.*—(a) *General.* (1) Any person legally holding a currently valid license or certificate may make application at any Coast Guard Marine Inspection Office for the issuance of a document bearing a special validation indorsement for emergency service. * * *

* * * * *

(d) *Basis for rejection.* The Commandant will deny a security clearance to any person, unless upon full consideration, he is satisfied that the applicant's character and habits of life are such as to authorize the belief that the presence of the person aboard vessels of the United States would not be inimical to the security of the United States; and in making the above determination the Commandant may consider whether on all the evidence and information available, reasonable grounds exist, for the belief that the individual:

(1) Has committed acts of treason or sedition, or has engaged in acts of espionage or sabotage; has actively advocated or aided the commission of such acts by others; or has knowingly associated with persons committing such acts; or,

(2) Is employed by, or subject to the influence of, a foreign government under circumstances which may jeopardize the security interests of the United States; or,

(3) Has actively advocated or supported the overthrow of the government of the United States by the use of force or violence; or,

(4) Has intentionally disclosed military information classified confidential or higher without authority and with reasonable knowledge or belief that it may be transmitted to a for-

eign government, or has intentionally disclosed such information to persons not authorized to receive it; or,

(5) Is or recently has been a member of, or affiliated, or sympathetically associated with, any foreign or domestic organization, association, movement, group, or combination of persons (i) which is, or which has been designated by the Attorney General as being totalitarian, fascist, communist, or subversive, (ii) which has adopted, or which has been designated by the Attorney General as having adopted, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or (iii) which seeks, or which has been designated by the Attorney General as seeking, to alter the form of the Government of the United States by unconstitutional means: *Provided*, That access may be granted, notwithstanding such membership, affiliation, or association, if it is demonstrated, by more than a mere denial, that the security interests of the United States will not thereby be jeopardized.

* * * * *

§ 121.17 *Right of appeal.* Any person who has been denied a security clearance, or who is required to surrender any document evidencing security clearance, shall have the right to appeal from such action in the manner described in this part.

§ 121.19 *Local Appeal Boards.* (a) The Commandant will appoint a Local Appeal Board in each coastal Coast Guard District. Each board will be composed of three members, one to be designated as Chairman who shall represent the Coast Guard in the public interest; the other members of the Board shall, so far as practicable, represent management and

labor and shall be drawn from a panel containing such representatives. * * *

* * * * *

(c) The Board shall consider fairly each appeal brought before it. Its proceedings shall be conducted with due regard to the National Security.

§ 121.21 *Chairman of the Board; duties and responsibilities.* (a) The Chairman of the Board shall * * *

* * * * *

(3) Furnish the appellant with a written notification stating:

(i) The basis for the action in the form of a written statement or bill of particulars setting forth the alleged acts, or associations, or beliefs, or other data which formed the basis for the determination that the appellant is a poor security risk or is not entitled to security clearance. This statement or bill of particulars shall not be worded with such particularity or specificity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to the appellant or to other persons. This written statement or bill of particulars will be prepared by the Commandant and will be furnished by him to the Chairman of the Board for inclusion in the written notification required by this paragraph.

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(v) That the appellant may appear personally before such Board; be present during the entire hearing; be represented by counsel, or other representative, of his own choosing; and present evidence in his own behalf, through witnesses, or by documents, or both.

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§ 121.23 *Hearing of appeals.* * * *

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(c) Hearings may be conducted in open or closed session at the option of the appellant: *Provided, however,* That if it appears during the course of the hearing that data whose disclosure would be inimical to the security of the United States or to the interests of the appellant might be divulged, the Chairman shall see that such disclosure is not made to persons who are not authorized to receive it.

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§ 121.25 *Recommendations of the Board.* (a) The Board shall carefully consider all material before it, including the data furnished upon which denial of security clearance was based, together with the data presented by the appellant. * * *

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(d) The recommendation of the Board together with all documentary data shall be transmitted by the Chairman of the Board directly to the Commandant for his determination. A complete but concise statement of the reasons or basis upon which the Board and the dissenting member if any arrived at its or his recommendation shall accompany the record. The Commandant may either approve or reject the recommendation of the Board or remand the case for further proceedings.

(e) The appellant will be notified in writing of the decision of the Commandant. Should the decision be adverse to the appellant, he will be advised of his right further to appeal and of the procedure for taking such an appeal.

§ 121.27 *National Appeal Board.* (a) For the purpose of considering further appeals, there shall be established at Coast Guard Headquarters, Washington, D.C., a National Appeal Board which shall be composed of three members, * * *

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§ 121.29 *Hearing of appeals before National Appeal Board.* * * *

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(c) Hearings may be conducted in open or closed session at the option of the appellant: *Provided, however,* That if it appears during the course of the hearing that data whose disclosure would be inimical to the security of the United States or to the interests of the appellant might be divulged, the Chairman shall see that such disclosure is not made to persons who are not authorized to receive it.

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§ 121.31 *Final action on appeal.* (a) The Commandant is the final authority to grant or deny security clearance.

(b) Upon receipt of the recommendation of the National Appeal Board and after careful consideration of the case, the Commandant will notify the appellant, in writing, of his final decision.

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